Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Computer III Further Remand	)	CC Docket No. 95-20
Proceedings: Bell Operating Company	)	
Provision of Enhanced Services	)	
	)	

COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

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Preliminary Statement

MCI Telecommunications Corporation (MCI), by its undersigned attorneys, submits the following comments in response to the Notice of Proposed Rulemaking (Further Remand Notice or Notice) initiating this proceeding[1/] on remand from California III.[2/]

MCI is vitally dependent upon the local exchange network facilities of the Bell Operating Companies (BOCs) and other local exchange carriers (LECs). As the second largest interexchange carrier, MCI has an interest in ensuring that the rates it pays for the BOCs' regulated interstate access services -- its largest single cost -- are not artificially inflated to subsidize the BOCs' competitive, unregulated activities. As an increasingly significant provider of enhanced services, MCI also has an interest in ensuring equal, nondiscriminatory, reasonably priced access to fully unbundled basic network facilities for all enhanced service providers (ESPs). Accordingly, MCI was one of

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1/ FCC 95-48 (released February 21, 1995).

2/ 39 F.3d 919 (9th Cir. 1994).

the key participants in the Commission's Computer II,[3] Computer III[4] and Computer III Remand[5] proceedings -- which focused on the conditions under which the BOCs would be permitted to provide enhanced services -- and successfully sought review of the Computer III Orders[6] in California I[7] and of the Computer III Remand Order[8] in California III.[9]

In both California I and California III, the Court vacated the Commission's decisions (in the Computer III Orders and the Computer III Remand Order) to eliminate the Computer II

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[3] Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384 (1980), mod. on reconsideration, 84 FCC 2d 50 (1981), mod. on further reconsideration, 88 FCC 2d 512 (1981), aff'd sub nom. Computer and Communications Industry Ass'n. v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

[4] Amendment of Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986), on reconsideration, 2 FCC Rcd 3035 (1987); Phase II, 2 FCC Rcd 3072 (1987) (collectively, Computer III Orders), vacated and remanded sub nom., California v. FCC, 905 F.2d 1217 (9th Cir. 1990).

[5] Report and Order, Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991) (Computer III Remand Order), partly vacated sub nom. California v. FCC, 39 F.3d 919 (9th Cir. 1994).

[6] See n.4, supra.

[7] California v. FCC, 905 F.2d 1217 (9th Cir. 1990).

[8] See n.5, supra.

[9] The Newspaper Association of America was the other prevailing appellant in California III.

structural separation requirement[10] previously governing the BOCs' provision of enhanced services and to substitute nonstructural regulatory protections therefor. In California III, the Court once again determined, as it had in California I, that the Commission still has not provided a rational basis for such "structural relief" for the BOCs. In particular, the Court, in vacating in part the Computer III Remand Order, held that

> the FCC has ... failed to provide support or explanation for some of its material conclusions regarding prevention of access discrimination. Thus, once again, we conclude that the FCC's cost benefit analysis is flawed and set aside the Order on Remand as arbitrary and capricious under the APA.

39 F.3d at 930.

The Court explained that the Commission's original vision of Open Network Architecture (ONA), set forth in Computer III, "still has not been achieved."[11] Since the Commission, in Computer III, had found that the Comparably Efficient Interconnection (CEI) rules, along with the other antidiscrimination regulations, were not adequate to prevent access discrimination "without fully implemented ONA,"[12] "[t]he FCC has not explained adequately how its diluted version of

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[10] See n.3, supra, and Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies, 95 FCC 2d 1117, 1120 (1984) (subsequent history omitted).

[11] California III, 39 F.3d at 929.

[12] Id.

ONA" -- even in tandem with the other antidiscrimination regulations -- "will prevent this behavior."[13/]

In response to California III, the Commission once again presents the structural separation issue in its Further Remand Notice. Apparently, however, the Commission is still in deep denial as to the actual holding of California III, and its misreading of that case threatens to undermine this entire proceeding by "tilting" the cost-benefit analysis that must be performed in the direction of full structural relief. The Commission reads California III as upholding most of the structural relief granted in the Computer III Remand Order -- namely permitting structurally integrated, or "joint", BOC enhanced services pursuant to service-specific CEI plans -- while vacating only the final step toward full structural relief, i.e., dispensing with the need to file CEI plans prior to the offering of any integrated enhanced services, once an ONA plan is approved.

Thus, under the Commission's reading of California III, a BOC may still offer any enhanced service jointly with its regulated services simply by obtaining approval of a CEI plan covering such service. By assuming that California III upheld most of the structural relief granted in the Computer III Remand Order, the Commission starts this proceeding with integrated BOC

13/ Id.

enhanced services as a given, thereby framing the main policy choice as a narrow one between integrated services under CEI plans and integrated services under ONA plans. This distorted reading of California III was first expressed in the BOC Waiver Order,[14/] which permits the BOCs to continue providing all of their enhanced services pending approval of CEI plans.

As MCI explained in its comments on the petition for reconsideration of the BOC Waiver Order filed by the Information Technology Association of America (ITAA), however, California III vacated and remanded the entire cost-benefit analysis in the Computer III Remand Order on which structural relief was predicated, and all structural relief granted in that order along with it.[15/] Because the structural relief granted in the Computer III Remand Order was entirely vacated, the proper starting point for the policy cost-benefit analysis in this proceeding is complete structural separation under the prior Computer II rules. If the Commission, by assuming that the starting point is structural integration under CEI plans, proceeds under such an elementary misapprehension of the current legal landscape, any structural relief granted at the conclusion

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[14/] Memorandum Opinion and Order, Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, DA 95-36 (CCB released Jan. 11, 1995).

[15/] Reply of MCI Telecommunications Corporation in Support of the ITAA Petition for Reconsideration, Bell Operating Companies' Joint Petition for Waiver of Computer II Rules (March 15, 1995). MCI's Reply is attached as Appendix A to its ex parte submission filed herewith but not served on all parties, due to its bulk.

of this docket is virtually certain to be reversed. As a prevailing party on the structural separation issue in both California I and California III, MCI strongly urges that the Commission at least try to start in the right place this time around.

Because of the truncated nature of the policy choice posed in the Further Remand Notice, MCI's comments will address a somewhat broader range of issues than is sought by the Notice. MCI's comments will explore the costs and benefits of moving from the current Computer II structural separation regime to fully integrated BOC enhanced services. As will be explained, the benefits of structural integration have not been demonstrated, and the competitive and ratepayer costs have grown since Computer III. Accordingly, structural separation should be retained, at least until the BOC network can be fundamentally unbundled as originally envisioned in Computer III.

The Further Remand Notice

In its Notice, the Commission first traces the relevant regulatory and legal background -- the Computer III, ONA[16/] and Computer III Remand proceedings, the Ninth Circuit's decisions in

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16/ Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1 (1988), recon., 5 FCC Rcd 3084 (1990), 5 FCC Rcd 3103 (1990), erratum, 5 FCC Rcd 4045 (1990), aff'd sub nom., California v. FCC, 4 F.3d 1505 (9th Cir. 1993).

California I, California II[17] and California III, and, following California III, the BOC Waiver Order.[18] Unfortunately, as discussed above, the Notice adopts the misreading of California III first presented in the BOC Waiver Order, thereby skewing its statement of the issues on remand:

> [W]e are here seeking comment on whether the nonstructural access discrimination safeguards spelled out below -- including the current level of ONA network unbundling -- provide sufficient protection, given the benefits of integrated BOC provision of enhanced services, to lift the service-specific CEI plan filing requirements as contemplated in Computer III and the [Computer III Remand Order].
>
> Beyond the specific issues we are required to address by the California III remand, several parties have raised broader questions about whether our decision to rely on nonstructural safeguards serves the public interest. We therefore solicit comment on whether structural separation should be reimposed for some or all BOC enhanced services.[19]

In fact, the Commission has it backwards. Since California III returned the industry to the Computer II structural separation regime, the Commission must, if it wants to consider any structural relief at all, take comments on all costs and benefits of moving from full structural separation to integrated services under CEI and ONA. Any review of such costs must include all risks of structural integration -- cross-subsidies as well as various forms of discrimination. The choice presented in

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[17] California v. FCC, 4 F.3d 1505 (9th Cir. 1993).

[18] See Further Remand Notice at ¶¶ 3-10.

[19] Further Remand Notice at ¶¶ 12-13.

paragraph 12 of the Notice -- whether to move from service-by-service relief under CEI to across-the-board relief under ONA -- is therefore a relatively minor subset of the remand issues actually raised by the holding of California III.

In its elaboration on the remand issues, the Commission reviews the current state of CEI, ONA and other antidiscrimination regulations.[20/] In describing ONA, the Commission especially focuses on the process under which ESPs may request new ONA features and the central role played by the Information Industry Liaison Committee (IILC) in that process.[21/] The Notice also reviews developments in other proceedings, such as the Expanded Interconnection[22/] and Intelligent Networks[23/] dockets, and requests comments on

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[20/] Further Remand Notice at ¶¶ 14-31.

[21/] Id. at ¶¶ 20-22.

[22/] Expanded Interconnection with Local Telephone Company Facilities, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992), recon., 8 FCC Rcd 127 (1992), further recon., 8 FCC Rcd 7341 (1993), vacated in part and remanded sub nom. Bell Atlantic Telephone Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994); Expanded Interconnection with Local Telephone Company Facilities, Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374 (1993), pet. for review pending sub nom. Bell Atlantic v. FCC, No. 93-1743 (D.C. Cir., filed Nov. 12, 1993); Expanded Interconnection with Local Telephone Company Facilities, Transport Phase II, Third Report and Order, 9 FCC Rcd 2718 (1994); see also Expanded Interconnection with Local Telephone Company Facilities, Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994), appeal docketed sub nom. Southwestern Bell Telephone Co. v. FCC, No. 94-1547 (D.C. Cir. Aug. 10, 1994).

[23/] Intelligent Networks, CC Docket No. 91-346, Notice of Proposed Rulemaking, 8 FCC Rcd 6813 (1993); see also Intelligent Networks, Notice of Inquiry, 6 FCC Rcd 7256 (1991).

whether these other proceedings achieve some of the goals of fundamental unbundling and provide protection against access discrimination.[24/] The Notice discusses the state of competition in enhanced services and requests comments on the impact of such competition on the ability of the BOCs to engage in access discrimination.[25/]

In the concluding section of the Notice, the Commission restates the cost-benefit analysis that must be performed, based on its misreading of California III.[26/] Thus, it first requests comments on whether the public interest benefits of replacing the service-specific CEI plan regime with full structural relief justify whatever increased risks of access discrimination that may result. Second, it requests comment on the broader issue of whether structural separation should be reimposed. The Notice recites some of the factors to be considered, including the supposedly inhibiting effects of structural separation -- and beneficial effects of structural relief -- on the BOCs' development and offering of enhanced service and the implications for structural relief of the MemoryCall[27/] case and other incidents of anticompetitive behavior and cross-subsidization.

[24/] Further Remand Notice at ¶¶ 30-31.

[25/] Id. at ¶¶ 32-34.

[26/] Id. at ¶¶ 35-40.

[27/] Investigation into Southern Bell Telephone & Telegraph Co.'s Provision of MemoryCall Service, Docket No. 4000-U (Ga. PSC June 4, 1991).

The Notice also asks whether there are any unbundled network services not now available that ESPs could use in offering new services and that satisfy the Computer III criteria for new ONA service requests by ESPs. Finally, the Notice asks for comments on the transitional costs of a return to structural separation.

Because the Commission's misreading of California III warps the policy choices presented in the Notice, comments organized around the issues as formulated in the Notice would be inadequate for the issues that are actually raised by the remand in California III and that must be addressed in this proceeding. By the same token, one issue raised by the Notice is irrelevant to a rational cost-benefit analysis, namely, the costs of any transition to structural separation. Since California III has already returned the industry to structural separation, absent a waiver, the BOCs should not be able to "count" the costs of transitioning to a regime they should already be following. For purposes of any rational cost-benefit analysis, the status quo is the policy of structural separation; the issue now is whether that regime should be replaced by the integrated provision of enhanced services subject to nonstructural regulations.

Because the starting point for the analysis is structural separation, any transition costs -- e.g., setting up a separate subsidiary and transferring enhanced services to that subsidiary -- are irrelevant. Only because the Commission has

granted an interim waiver of the Computer II structural separation rules in the BOC Waiver Order are the BOCs able to provide enhanced services on an integrated basis.

The fundamental principle underlying the waiver process is that the waiver recognizes the validity of the rule being waived. WAIT Radio v. FCC, 418 F.2d 1153, 1158 (D.C. Cir. 1969). A waiver may not be so broad as to eviscerate the rule, but rather should be a narrowly tailored exception to the rule. Id. at 1159. The BOC Waiver Order thus effected no change in the structural separation rules that were restored by the Ninth Circuit's vacation and remand of the structural relief granted by the Computer III Remand Order.

Since the public policy status quo is structural separation, the BOCs would have already established separate subsidiaries for their enhanced services, but for the waiver. They thus would have incurred no additional one-time costs, but for the waiver, in the event that the Commission ultimately decides to continue the structural separation regime. If the Commission counts the costs of "returning" to the regulatory status quo as a reason for changing the rule, it will have allowed the BOCs to bootstrap a mere waiver into the basis for an entirely new policy.[28/]

[28/] Moreover, even if such transition costs were relevant, the BOCs would still have to do better than the superficial, conclusory ex parte estimates of cost savings submitted at the last minute in the Computer III Remand proceeding. Such economic (continued...)

MCI accordingly will organize its comments around the full range of issues that must be explored in resolving the policy choice presented by California III's remand of the structural separation issue, beginning with the supposed benefits of structural integration.

I. THE BOCS CANNOT DEMONSTRATE ANY SIGNIFICANT BENEFITS FROM STRUCTURAL INTEGRATION

Since California III returned the industry to structural separation, the first issue that must be examined on remand is whether there are any significant public benefits resulting from a change to structural integration that could not have been brought about by alternative means under structural separation. Each element of the necessary benefits assessment is important: the supposed benefits must be significant; they must be public benefits, rather than merely benefits to the BOCs; the benefits must result from structural integration; and they must result only from structural integration -- i.e., it must be shown that such benefits could not have been generated in some other way under structural separation.[29/]

[28/](...continued)
estimates are useless and unreliable without supporting data and an explanation of the methodology used to generate the estimates, so that opposing parties can probe the BOCs' conclusions adequately.

[29/] In the Further Remand Notice, the Commission recognizes that, in a rational cost-benefit analysis, the putative benefits of a given policy choice must be shown to result only from that choice; i.e., it must be shown that such benefits could not also result if the opposite choice were made. Id. at ¶ 39 (parties (continued...)

A. The BOCs Cannot Show Significant Benefits to Their Enhanced Services From Structural Integration

The BOCs cannot come close to making such a showing. First, even after several years of integrated BOC enhanced services under the orders vacated in California I and California III and various waivers, the BOCs do not have much to show for all of the hype generated on this issue. Other than voice messaging services, MCI is not aware of any BOC enhanced service offerings that have made significant headway in the marketplace. The "modest success" of the BOCs' videotex gateways is typical of most of the BOCs' enhanced services and related offerings.[30/] Thus, except for larger numbers of voice messaging customers, the BOCs' situation does not appear to have changed much since the Computer III Remand proceeding.[31/]

Moreover, there is no reason, other than the BOCs'

[29/](...continued)
should "identify the benefits" of structural separation "and articulate why these benefits cannot be achieved under a regime of nonstructural safeguards").

[30/] The Provision of On-Line Information Services at 47, 50, April 1, 1993, attached to the Affidavit of Jerry A. Hausman, U.S. v. Western Electric Co., Inc. and American Tel. and Tel. Co., C.A. No. 82-0192 (D.D.C. June 10, 1993). It is difficult to get a handle on the extent of the BOCs' progress in enhanced services. When they are seeking more relief before the MFJ court, they tend to depict their enhanced services as struggling for survival, as in the Hausman Affidavit. When they are seeking relief from structural separation before this Commission, their services are thriving, having "grown dramatically." Joint Contingency Petition for Interim Waiver of the Computer II Rules at 13, Bell Operating Companies' Joint Contingent Petition for Interim Waiver of the Computer II Rules (Nov. 14, 1994).

[31/] See Computer III Remand Order, 6 FCC Rcd at 7619, ¶¶ 102-103.

assertions, to believe that they could not have offered the same enhanced services under structural separation. Obviously, the BOCs prefer to offer enhanced services in a manner that best exploits their monopoly advantages -- i.e., jointly with their regulated services. As long as there was a possibility of structural relief, there was not much incentive to offer enhanced services on a fully separated basis. That the BOCs were incented to hold out for more favorable conditions, however, is not the same as a showing that they could not have offered the same enhanced services at the same rates under structural separation.

Unless the Commission requires the latter showing as a first step in demonstrating the benefits of structural integration, the benefits side of the balance becomes a makeweight that is automatically satisfied by the mere fact that the BOCs prefer the change and will hold out for it. It is not good public policy to reward the BOCs for denying the public a new service until the BOCs can offer it under conditions more favorable to themselves. Thus, the BOCs cannot logically demonstrate a public benefit resulting from structural integration merely by the coincidence of structural relief and the offering of new BOC enhanced services. Instead, they must at least show, through economic data, that structural integration creates such significant efficiencies in the provision of enhanced services that it has made and will make a difference in determining whether such services could be offered. In other words, the BOCs must show

that they could not, under structural separation, have profitably offered on a competitive basis, the enhanced services they are offering now on an integrated basis.

It is extremely unlikely that the BOCs ever could make such a showing that is supportable in any meaningful sense, since thousands of ESPs, all of whom are completely separated from the BOCs' network operations, somehow manage to provide a wide variety of mass market and other enhanced services in the face of continuing BOC discrimination and unresponsiveness to ONA service requests. It is also doubtful that structural relief would make the difference between offering and not offering an enhanced service, given the tremendous mark-up the BOCs enjoy on the enhanced services. Moreover, some of the BOCs themselves voluntarily provide their enhanced services through partially separated subsidiaries, casting further doubt on the argument that it would be impossible for them to provide enhanced services profitably through fully separate subsidiaries.[32/]

B. The BOCs Cannot Demonstrate Public Benefits Resulting From Structural Integration That Could Not Also Occur Under Structural Separation

More importantly, it is still not enough to show that the BOCs profit by structural integration; the benefits must accrue

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[32/] See, e.g., Application of Pacific Bell (U 1001 C) for Authorization to Transfer Specified Personnel and Assets, Application 90-12-052, Decision 92-07-072 (CPUC July 22, 1992) (Pacific Bell Transfer), attached as Appendix to MCI's ex parte submission.

to the public and must result only from structural integration. In order to demonstrate a logical causal relationship between such public benefits and structural integration, it must be shown that such benefits could not have been generated by an alternative means under structural separation. Taking the one significant BOC enhanced service -- voice messaging -- as an example, it must be shown not only that the BOCs could not have provided it profitably under structural separation but also that other ESPs are not providing it at the same rates and could not do so, even if they had been provided with the BOC network features they need in order to offer voice messaging at similar rates.

In other words, the central benefits analysis in this proceeding is whether the public would enjoy the same or greater benefits from expanded low-cost voice messaging services and other enhanced services under structural separation if ESPs were provided suitable, nondiscriminatory access to the BOC networks. That was how the same benefits issue was framed in the Custom Calling Denial Order, where the FCC found that the local telephone companies' unwillingness to provide enhanced services on a structurally separated basis "does not necessarily foreclose the availability of similar services to consumers" "if the local telephone companies provide the requisite interconnection

facilities" to other providers.[33/]

The FCC also followed that approach in the Computer III Notice of Proposed Rulemaking (Computer III Notice), when it stated, after noting that other voice messaging providers had not offered comparable services since the Custom Calling Denial Order:

> Of course, the type of interconnection that might have been used by others to configure services of this nature, at costs comparable to those inherent in AT&T's proposed custom calling services, was unavailable. See our discussion of the details of this in Sections IV and V infra. Had comparably efficient interconnection been available, others might be providing such services today. Absent such interconnection, the costs were far higher than the telephone companies' costs of providing such custom calling services on an integrated basis, and this may explain why alternatives have not arisen.[34/]

In the referenced portions of the Computer III Notice (Sections IV and V), the Commission discussed its proposals for open interconnection for ESPs, which led to the Computer III ONA principles.[35/] The FCC explicitly noted that "we are soliciting comment on interconnection ... opportunities that could facilitate efficient access by others to the [local] exchange [network]," and "these [proposed] changes might make it possible for [voice messaging] services ... to be provided consistently

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[33/] American Telephone & Telegraph Company Petition for Waiver, 88 FCC 2d 1, 26, 31 (1981) (emphasis added).

[34/] Amendment of Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Phase I, 50 Fed. Reg. 33581, 33582 n.8 (Aug. 20, 1985) (Notice of Proposed Rulemaking) (emphasis added).

[35/] Id. at 33599-602.

with our Computer II [structural separation] policies."[36/]

As explained in more detail in Part II, infra, to the extent that there is an obstacle to "mass market" enhanced services, it is the unavailability of reasonably priced, nondiscriminatory access to the BOCs' networks, not structural separation. In Computer III, several parties submitted extensive record material demonstrating the BOCs' campaign to deny voice messaging providers and other ESPs the interconnections they need to the network features they need to provide competitive services. The most compelling single example of such discrimination was the MemoryCall Order, which reads like a textbook example of BOC discrimination and anticompetitive conduct against competing providers.

In its order initiating a rulemaking addressing intrastate access to LEC network features, the California Public Utilities Commission confirmed that the joint provision of BOC enhanced services subject only to nonstructural regulations may well have denied, rather than facilitated, benefits to the public. In describing the problems that "arise when the dominant carrier is both a competitor and a supplier to independent unaffiliated providers,"[37/] the CPUC stated:

[36/] Id. at 33602 (emphasis added).

[37/] Order Instituting Rulemaking and Order Instituting Investigation, Rulemaking on the Commission's Own Motion to

(continued...)

> The participation of dominant carriers in potentially competitive markets can have a chilling effect on the emergence of competition if the competitive safeguards are perceived by competitors (regardless of what regulators themselves think) to be ineffective. The threat of being faced with a multibillion dollar competitor with bottleneck power who can squash other providers at will is a deterrent to potential entrants. We believe that inadequacies in federal regulatory safeguards may very well be responsible for much of the current lack of interest in mass market ventures.[38/]

Similarly, the recent filing by the Association of Telemessaging Services International (ATSI) amply demonstrates that the BOCs are still discriminating against independent voice messaging providers.[39/] Moreover, as the Court found in California III, there still has not been the type of fundamental unbundling of the network that was originally contemplated in Computer III. 39 F.3d at 929-30. Thus, even assuming that mass market voice messaging or other enhanced services were not available until recently, there is no reason to believe that structural separation was the reason. Rather, it was, and remains, the lack of reasonably priced, nondiscriminatory network

[37/](...continued)
Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks, R. 93-04-003; Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks, I. 93-04-002 (Cal PUC, April 13, 1993), attached as Appendix to MCI's ex parte submission.

[38/] Id. at 15.

[39/] Letter from Robert J. Butler to William F. Caton, Secretary, FCC, dated December 13, 1994, with attachments, filed in this docket.

access for ESPs that has suppressed the wider availability of cheap voice messaging and other enhanced services. Eliminating structural separation thus benefits only the BOCs, not the public, since the public would have enjoyed the same benefits from ESPs, whether or not the BOCs were prevented from offering such services by structural separation.

The potential availability of all mass market and other enhanced services from ESPs highlights another problem for any showing of public benefits that the BOCs claim for the elimination of structural separation -- namely, that the types of cost savings and efficiencies claimed for structural integration are not unique to the BOCs. For most BOC enhanced services, the BOCs have long since given up on trying to demonstrate efficiencies that are inherent in the BOCs' networks, such as technical network architecture integration efficiencies. Rather, the BOCs only claim that structural integration will allow such efficiencies as joint marketing and billing.[40/] They admit, that if anything, they are moving away from technical integration of their enhanced and basic services.[41/] Indeed, the BOCs have admitted that "[t]he economies of scope and scale available to the RBOCs are in many cases available, if in lesser measure, to

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[40/] Computer III Remand Order, 6 FCC Rcd at 7617-18, ¶¶ 99-100.

[41/] See Computer III Remand proceeding, BellSouth Reply Comments at 11-13 (April 8, 1991); US West Reply Comments at 47-51 (April 8, 1991), attached as Appendix to MCI's ex parte submission.

large customers."[42/]

Since any large customer of the BOCs could realize the same types of savings claimed by the BOCs, assuming it enjoyed full access to the BOCs' network features, elimination of structural separation is not a necessary prerequisite for such savings, or for the public benefits such savings could provide, in terms of enhanced services competition. Rather, fully unbundled access to the BOCs' networks remains the only key to the public benefits the Commission is trying to foster.

In summary, since the Commission has never fairly tested the condition stated in the Custom Calling Denial Order and the Computer III Notice -- i.e., ensuring that ESPs have the network access they need to provide mass market voice messaging services -- it will ever be known whether such services could have been made more widely available under structural separation. Thus, the BOCs cannot show that any significant public benefits have accrued or will accrue under structural integration that could not have been generated under structural separation. In assessing a policy shift from structural separation to the joint provision of BOC basic and enhanced services, there is therefore nothing on the public benefits side of the cost-benefit balance,

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[42/] Reply Affidavit of Kenneth J. Arrow and Andrew M. Rosenfield in Support of Section VII Motions for Removal of the Section II (D)(I) Restriction on the Provision of Information Services at 13, United States v. Western Electric Co. Inc. and American Tel. and Tel. Co., C.A. No. 82-0192 (D.D.C. Jan. 8, 1991).

even if the BOCs can show cost savings to themselves from structural integration.

II. THE ANTICONSUMER AND ANTICOMPETITIVE COSTS OF STRUCTURAL INTEGRATION HAVE INCREASED SIGNIFICANTLY SINCE COMPUTER III

A. Introduction

Not only are there no significant public benefits to be derived from a policy shift from structural separation to structural integration, but the anticonsumer and anticompetitive risks of such a shift have also increased markedly since Computer III. In Computer III, the Commission promised that its CEI/ONA rules and cost allocation rules would protect against access discrimination and cross-subsidies. In the Computer III Remand proceeding, faced with a massive record of egregious access discrimination under approved CEI plans and cross-subsidies under the cost allocation rules, the Commission promised that once ONA was fully in place, access discrimination would cease, that the strengthened cost accounting rules would control cross-subsidization and that price cap regulation would suppress incentives to cross-subsidize.[43/]

Now, faced with the California II[44/] and California III findings as to the inadequacy of ONA, relative to the Commission's original vision of ONA, the Notice suggests that ONA

[43/] 6 FCC Rcd at 7591-97, 7599-01, 7623 & n.211.

[44/] California v. FCC, 4 F.3d 1505 (9th Cir. 1993).

and the other current antidiscrimination regulations, which are unchanged from the Computer III Remand proceedings, nevertheless offer sufficient protection as they are. The problem with that notion is that BOC discrimination and other anticompetitive conduct has continued. Since ONA is not going to make any difference in its current or foreseeably future state, there is no reason to expect that BOC anticompetitive conduct will abate or can be controlled any better than it was previously.

As will be explained, the other proceedings mentioned in the Notice -- Expanded Interconnection and Intelligent Networks (IN) -- and increased competition in the enhanced services market provide no additional protection at all. Indeed, since competitive abuses typically occur at the boundaries between monopoly and competitive service markets, the emergence of competitive markets adjacent to and dependent upon the BOCs' local exchange bottleneck only increases the BOCs' opportunities to discriminate and cross-subsidize.

Finally, although the strengthened cost accounting rules and price cap regulation were supposed to take care of improper cost-shifting, various recent federal and state audits have uncovered a wide variety of abuses since the advent of price cap regulation. The Notice was strangely silent on this subject, but the audit evidence rebutting the Commission's theories as to the effectiveness of its protections against cross-subsidies must be